

forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.* (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(1) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(2) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.

[52 FR 2936, Jan. 29, 1987, as amended at 55 FR 30680, July 27, 1990. Redesignated at 57 FR 11571, Apr. 6, 1992, as amended at 60 FR 34089, June 30, 1995; 61 FR 18908, Apr. 29, 1996; 61 FR 19976, May 3, 1996; 61 FR 21228, May 9, 1996; 62 FR 10332, Mar. 6, 1997; 62 FR 15362, Apr. 1, 1997; 62 FR 17048, Apr. 9, 1997; 64 FR 8487, Feb. 19, 1999]

§ 1003.24 Fees pertaining to matters within the jurisdiction of an immigration judge.

(a) *Generally.* All fees for the filing of motions and applications in connection

with proceedings before the immigration judges are paid to the Department of Homeland Security in accordance with 8 CFR 103.7, including fees for applications published by the Executive Office for Immigration Review. The immigration court does not collect fees.

(b) *Motions to reopen or reconsider—(1) When a fee is required.* Except as provided in paragraph (b)(2) of this section, a filing fee prescribed in 8 CFR 1103.7, or a fee waiver request pursuant to paragraph (d) of this section, is required in connection with the filing of a motion to reopen or a motion to reconsider.

(2) *When a fee is not required.* A filing fee is not required in the following instances:

(i) A motion to reopen that is based exclusively on an application for relief that does not require a fee;

(ii) A motion to reconsider that is based exclusively on a prior application for relief that did not require a fee;

(iii) A motion filed while proceedings are already pending before the immigration court;

(iv) A motion requesting only a stay of removal, deportation, or exclusion;

(v) A motion to reopen a deportation or removal order entered in absentia if the motion is filed pursuant to section 242B(c)(3)(B) of the Act (8 U.S.C. 1252b(c)(3)(B)), as it existed prior to April 1, 1997, or section 240(b)(5)(C)(ii) of the Act (8 U.S.C. 1229a(b)(5)(C)(ii)), as amended;

(vi) Any motion filed by the Department of Homeland Security;

(vii) A motion that is agreed upon by all parties and is jointly filed; or

(viii) A motion filed under a law, regulation, or directive that specifically does not require a filing fee.

(c) *Applications for relief—(1) When filed during proceedings.* When an application for relief is filed during the course of proceedings, the fee for that application must be paid in advance to the Department of Homeland Security in accordance with 8 CFR 103.7. The fee receipt must accompany the application when it is filed with the immigration court.

(2) *When submitted with a motion to reopen.* When a motion to reopen is based upon an application for relief, the fee

for the motion to reopen shall be paid to the Department of Homeland Security and the fee receipt shall accompany the motion. Payment of the fee for the application for relief must be paid to the Department of Homeland Security within the time specified by the immigration judge.

(d) *Fee waivers.* The immigration judge has the discretion to waive a fee for a motion or application for relief upon a showing that the filing party is unable to pay the fee. The request for a fee waiver must be accompanied by a properly executed affidavit or unsworn declaration made pursuant to 28 U.S.C. 1746 substantiating the filing party's inability to pay the fee. If the request for a fee waiver is denied, the application or motion will not be deemed properly filed.

[69 FR 44906, July 28, 2004]

§ 1003.25 Form of the proceeding.

(a) *Waiver of presence of the parties.* The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend.

(b) *Stipulated request for order; waiver of hearing.* An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or